IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 335.

AETNA INSURANCE COMPANY,

Petitioner,

—against—

ROBERT C. JEFFCOTT,

Respondent.

PETITIONER'S REPLY BRIEF.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Proctors for Petitioner.

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The respondent's brief in opposition to the petition for a writ of certiorari calls for a short reply.

POINT I.

Admiralty Jurisdiction.

Respondent's argument in regard to admiralty jurisdiction merely serves to emphasize the fact that never before in the long history of Article III, §2 of the Federal Constitution has any court held that admiralty has jurisdiction of a contract dealing with a vessel that was withdrawn from navigation, laid up and out of commission.*

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*On page 9 of his brief, respondent says that in *Kilb* v. *Menke*, 121 F. (2d) 1013 (C. C. A. 5), the Court sustained admiralty jurisdiction of a libel for possession of vessels that had been tied up and out of commission for almost four years. He should have pointed out that when the action was commenced the vessels were in process of being put back in service. The Court, in its opinion, said:

"Admiralty jurisdiction, especially in possessory and petitory suits, exists only in respect of ships or vessels engaged in navigation or commerce * * *."

As petitioner pointed out below, as well as in its petition and brief herein, all federal courts heretofore (including the Circuit Court of Appeals for the Second Circuit) have uniformly and consistently observed the distinction between vessels engaged in navigation and vessels withdrawn from navigation. Contracts in regard to the former are maritime and therefore subject to admiralty jurisdiction: contracts in regard to the latter are not maritime and therefore not subject to admiralty jurisdiction.

The Circuit Court of Appeals brushes aside this distinction with the simple statement that it is "unreal" (R., p. 1936). This Court, however, in *Krauss Brothers* v. *Dimon S. S. Corp.*, 290 U. S. 117, 122, cited with approval the case of *Pillsbury Flour Mills Co.* v. *Interlake Steamship Co.*, 40 F. (2d) 439; Cert. denied, 282 U. S. 845, in which this same Circuit Court of Appeals, over the protest of the same counsel who represent the petitioner in this case, laid down in its most extreme form the very distinction which it now repudiates.

Possibly the Circuit Court of Appeals was right. It may perhaps be that the "distinction" which this and all other federal courts have heretofore drawn in construing Article III, §2 of the Constitution is "unreal" and should now be abandoned. It may be that the theory, heretofore universally accepted, that a contract can only be maritime when it deals directly with commerce and navigation is an outworn concept which should follow *Swift* v. *Tyson* into limbo. But if so, this Court and this Court only, should so determine. The case is obviously one in which certiorari should be granted.

POINT II.

The American rule in matters of constructive total loss.

Under Point II of his brief, respondent cites five cases, four in this Court and one in the Circuit Court of Appeals for the 7th Circuit, in support of the statement by the Court below that "the American rule is the moiety rule". In each of those cases the disaster occurred while the vessel was *on a voyage* and therefore absent from its destination or the port to which it was to return or at which it was to remain.

The *Pezant* case (15 Wend. 453) held that when a vessel, insured under a time policy, had arrived at or was in her port of destination, the 50% rule had no application, but that in such case the rule of indemnity applied and the owner could abandon only when the cost of recovery and repair exceeded her *total* value.

The rule of the *Pezant* case, as will be pointed out later, is clearly law in Massachusetts, as well as New York; and as *Phillips on Insurance* points out (§1555), is law generally in this country.

Whether the rule of the *Pezant* case is deemed an exception to the "American rule" or as a limitation or qualification of it, is immaterial. The 50% rule, always heretofore limited to cases of cargoes or vessels on voyages or in distant ports, is based on the wholly understandable theory that it is fair to shift from the owner to the underwriter the burden of going far afield to recover a vessel or cargo damaged to more than 50% of its value. The rule of the *Pezant* case, which merely applied to hull the rule universally followed in cargo cases, is based on the equally understandable doctrine that when a vessel is "at home" the owner cannot unjustly enrich

himself by recourse to the 50% rule—he can only abandon when the cost of recovery and repair exceeds the entire value of the vessel.

The case of *American Insurance Company* v. *Ogden* (15 Wend. 532; 20 Id. 287) is not in any way contrary to the *Pezant* case, as urged by respondent on pages 16-17 of his brief. On the contrary, the *Ogden* case strongly supports the rule laid down in the *Pezant* case. The *Ogden* case was not reversed "on other grounds" as suggested by respondent. One of the principal grounds of the reversal was the same ground on which Judge Bronson (who wrote the opinion in the *Pezant* case) dissented below, namely, that the events on which the assured based his claim for a constructive total loss occurred "in the port of destination, where at least he ought to have either funds or credit if not in other places". Of the three members of the Appellate Court who delivered opinions on appeal, two (including the Chancellor) specifically expressed their concurrence in the opinion of Judge Bronson below. The Chancellor called attention to the fact that the vessel "was in one of her regular ports of destination, with her cargo on board when she arrived in a disabled state"; and Senator Verplanck also refers to the fact that the loss occurred in a port of destination.

In attempted answer to petitioner's statement that the 50% rule, if applied to a case like the present, necessarily violates the fundamental concept that insurance is a contract of indemnity, the respondent (Brief, p. 19) merely quotes the statement of the House of Lords in *Irving* v. *Manning*, 1 H. L. C. 287, that a valued policy is not a perfect contract of indemnity. However, in the later case of *Rankin* v. *Porter*, 1873 L. R. 6 H. L. 83, 101-102, the House of Lords referred to—

> "* * * the cardinal principle of marine insurance, the principle of indemnity * * *."

The fact that perfection is unattainable is no ground for throwing "cardinal principles" to the winds. The decision below does just that.

POINT III.

Under *Erie Railroad* v. *Tompkins* and *Just* v. *Chambers*, the lower courts were bound to follow the state law.

(1)

The respondent says (Brief, pp. 21-22) that it is essential that marine insurance policies be uniformly construed according to the principles of admiralty law, and that accordingly *Erie Railroad* v. *Tompkins* has no application.

The decision of this Court in *Washburn & Moen Manufacturing Co.* v. *Reliance Marine Ins. Co.*, 179 U. S. 1, holds precisely the contrary. Marine insurance policies have *always* been construed according to state law, or, as in the *Washburn & Moen Manufacturing Co.* case, according to the federal "general commercial law". Suits on marine insurance policies are constantly brought in the state courts, and on the law side of the federal courts, and no case has ever held, nor so far as we can ascertain has it ever before been suggested, that marine insurance policies must be construed according to the uniform system of admiralty law as laid down in the federal courts (see cases cited on pp. 30 and 31 of our brief in support of the petition for certiorari). That being so, it follows that under *Erie Railroad* v. *Tompkins*, the law of *some* state must control here, for there is now no federal "general commercial law".

(2)

It is true, as respondent says (Brief, p. 20) that the petitioner argued below that Massachusetts law controlled. It is not true, however, that the rule of *Erie Railroad* v. *Tompkins* was not raised by petitioner in the court below. We quote as follows from pages 7 and 8 of the petitioner's brief in the Circuit Court of Appeals:

> "In a common law action in the Federal Court for the Southern District of New York, the law as established by the decisions of New York State would be controlling. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64; *Fidelity Trust* v. *Field*, 311 U. S. 169, 177. • • •
>
> "Both the decisions of Judge Coxe and Judge Clancy appear to be contra to the decision of the United States Supreme in *Just et al.* v. *Chambers* (*The Friendship II*), 312 U. S. 383 (March 3, 1941), which held that 'a court of admiralty will recognize and enforce [the state law] when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation' (p. 388). The Supreme Court said further 'uniformity is required only when the essential features of an exclusive federal jurisdiction are involved' (p. 392). Certainly the interpretation of a Massachusetts contract of insurance on a vessel laid up in Connecticut is not a matter which affects 'the characteristic features of the maritime law' or 'the essential features of an exclusive federal jurisdiction'."

But the Circuit Court of Appeals rejected this argument. As the Circuit Court of Appeals devoted most of its discussion to the New York law, which it declined to follow, it evidently assumed (as pointed out on p. 28 of petitioner's principal brief) that New York law was the law which would apply, if the court were bound to follow

state law. In the petition and the supporting brief, we adopted this assumption of the Circuit Court of Appeals and argued that the court was bound by New York law, under *Erie Railroad v. Tompkins,* and that the New York law was as set forth in the *Pezant* case (15 Wend. 453). As the law of either New York or Massachusetts controls, and as the respondent now concedes that the policies were Massachusetts contracts, we wish to point out that the rule of the *Pezant* case is likewise law in Massachusetts. The courts below accordingly committed fundamental error, regardless of whether New York or Massachusetts law controlled.

In the *Pezant* case, the court, in rejecting the argument that the "50% rule" applied to a vessel which was "at destination", said (p. 460):

> "The case of *Wood* v. *Ins. Co.*, 6 Mass. 479, is, I think, an authority against the plaintiffs. That was an insurance on the ship for one year. On her way home she was stranded on rocks, and while in a perilous situation the owners offered to abandon, but the offer was not accepted. The vessel soon afterwards sunk, but she was weighed within a few days and brought to the wharf in her port of destination. The court held that stranding merely was not a sufficient ground for abandoning, and the plaintiff had, consequently, acquired nothing by the offer to abandon, while the vessel lay upon the rocks, before she sunk. And in relation to the subsequent rights of the parties, Ch. J. Parsons said: 'To enable the owner to abandon, there must be, at some period during the voyage, a total loss, either real or constructive; but in the present case no such loss has happened. The vessel has not been lost, nor has the voyage been defeated; but it appears that the voyage has, in fact, been performed; and that the vessel was in safety at her

> destined port.' He then observed, that it did not appear what degree of injury the vessel had sustained, and that the court could not presume 'that the injury was such as rendered her not worth repairing.' The plaintiff was only permitted to recover for a partial loss."

It has been uniformly held in Massachusetts that in the case of cargo there can be no abandonment for a constructive total loss where the cargo or a part of it reaches destination, unless the cost of recovering and reconditioning the cargo exceeds its *entire* value. The moiety or 50% rule has no application in such a case.

> *Forbes* v. *Manufacturers Insurance Co.*, 1 Gray (Mass.) 371, 375;
> *Pierce* v. *Columbian Insurance Co.*, 14 Allen (Mass.) 320, 322;
> *Parsons on Marine Insurance*, Vol. II, p. 159.

The rule in regard to abandonment for constructive total loss in cases of hull insurance grew out of the cargo rule (*Ruckman* v. *Merchants' Louisville Ins. Co.*, 5 Duer (N. Y.) 342, 362) and no court has ever suggested that any difference exists between hull and cargo in matters of constructive total loss.

Furthermore, Phillips, a Massachusetts lawyer, in his standard work on Insurance, says that the *Pezant* case states the law and represents the better view (*Phillips on Insurance*, §1555).

Accordingly it can be said with certainty that the rule of the *Pezant* case is the law of Massachusetts, as well as of New York. It was therefore binding on the courts below, under the doctrine of *Erie Railroad* v. *Tompkins*, regardless of whether the case was controlled by New York or Massachusetts law. The fact that the *Pezant*

case was decided by an "intermediate appellate court" is of course immaterial—

Fidelity Trust Co. v. *Field*, 311 U. S. 169;
Six Companies v. *Highway Dist.*, id. 180;
West v. *A. T. & T. Co.*, id. 223, 237-8.

Erie Railroad v. *Tompkins* held that it was intolerable to make the outcome of a case depend on the circumstance (accidental as far as one of the litigants was concerned) of whether the litigation was in the state or federal court. We suggest that it is equally intolerable to make the outcome of a case depend on the circumstances (accidental as far as the defendant or respondent is concerned) of whether the litigation is on the law or the admiralty side of the court.

The petitioner is not seeking (as the respondent erroneously states on p. 22 of his brief) to extend the doctrine of *Erie Railroad* v. *Tompkins* to the field of general maritime law. No court has ever held that marine insurance policies are within that field, and this court, in the *Washburn & Moen* case, held that they were not.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

D. ROGER ENGLAR,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Proctors for Petitioner.

New York, N. Y., September 21, 1942.

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RESPONDENT'S ANSWER TO PETITIONER'S REPLY BRIEF

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JOHN THEIRY CARPENTER,
Counsel for Respondent.

The Keale Press — New York City

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RESPONDENT'S ANSWER TO PETITIONER'S REPLY BRIEF

Petitioner, in its reply brief (Point III 5-9), does an "about face" from the position taken by it in Point III of its main brief (28) and unequivocally states that "the Pezant case *is the law of Massachusetts as well as of New York*" (reply brief 8) for the mere reason that *Wood* v. *Ins. Co.*, 6 Mass. 479, was referred to and discussed in the Pezant opinion (*Pezant* v. *National Ins. Co.*, 15 Wend. 453). This is a complete *non sequitur*.

Wood v. *Insurance Co.*, supra, in no way supports the Pezant decision for it is based upon failure of proof that cost of repairs exceeded 50% of the vessel's value. The

vessel there involved was stranded upon the rocks during the insurance term, whereupon plaintiff immediately tendered abandonment to defendant underwriter which the latter refused to accept; the vessel was soon disengaged from the rocks, sank and thereafter was raised and brought to her port of destination where she was repaired by defendant underwriter and tendered to the plaintiff, who refused to accept her and sued, claiming a constructive total loss. There was a consent verdict for plaintiff for a total loss subject to the court's determination on the law and facts. The court set aside the verdict on the ground that there was no proof that cost of repairs exceeded "the half of her value" (482) or that "she received any essential injury by the accident, or that an attempt to weigh her and prepare for finishing her voyage would have been hazardous or very expensive", or that "no assistance, materials or workmen could be reasonably procured" (484-5). "It does not appear from the case, that the vessel was wholly repaired by the defendants; nor is it stated, *what degree of injury she sustained by the stranding. We cannot therefore presume that the injury was such, as rendered her not worth repairing*" (485).

Nor do the Massachusetts cases cited by petitioner (reply brief 8) support the decision in the *Pezant* case. *Forbes* v. *Manufacturers Ins. Co.*, 1 Gray 371, 375, and *Pierce* v. *Columbian Insurance Co.*, 14 Allen 320, 322, both *involved policies on cargo for specified voyages* where abandonment was not made until after completion of the voyage and discharge of the cargo from the ship and completion of the risk. They were decided upon the principle that an abandonment, to be effective, must be made promptly. In the *Pierce* case, supra, the court said:

> "The abandonment necessary to convert a constructive total loss into an actual total loss must be made promptly after receiving information, and, by our law,

is good or bad when made, and, if valid, immediately vests the rights of the parties. 3 Kent, Comm. 320, 324."[1]

Petitioner is incorrect in stating that "the law of either New York or Massachusetts controls" (reply brief 7). The controlling decisions are those of the courts sitting in admiralty where the cause was prosecuted. *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 313. To hold otherwise would prevent the court from applying its own jurisprudence in the decision of maritime questions properly before it. This Court has frequently held that, in cases of concurrent jurisdiction, the rights of the litigants depend upon the circumstance of whether the action is in admiralty or at law. *Atlee* v. *Packet*, 21 Wall. 389, 395; *The Max Morris* v. *Curry*, 137 U. S. 1. It is not "intolerable", as petitioner suggests (reply brief 9), that this should be so. The two jurisdictions are separate and distinct, each with a different history, heritage and jurisprudence.[2]

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[1] The Circuit Court of Appeals below observed: "A more likely explanation is that the court in the Pezant case was using an indirect approach to the rule that abandonment must be decided upon at the time the ship is in peril or reasonably soon thereafter" (R. 1939).

[2] The words omitted by petitioner in the footnote (reply brief 1) from the sentence quoted from *Kilb* v. *Menke*, 121 F. (2d) 1013, are most significant; they are: "* * * and not over hulks, or vessels that have been permanently taken out of such use" (1014). The *Dauntless* was not a "hulk", nor had she been "permanently taken out" of use as a vessel. The point that one (Markatana) of the two vessels involved in *Kilb* v. *Menke*, supra, had been towed to a new anchorage which was held to "put her back into service" was immaterial to the decision since the other vessel (Kalitan) was not so "towed", but remained moored in her original position "from Dec. 8, 1936 till Nov. 28, 1940 when seized under the warrant", and her inspection certificate authorizing her "use in navigation as a steam vessel" had expired July 7, 1939. The fact that the court sustained admiralty jurisdiction of the libel as to both vessels (Kalitan as well as Markatana) is clear proof that it placed no legal significance on the fact that the latter had been "put * * * back into service" while the former had not.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE C. SPRAGUE,
JOHN TILNEY CARPENTER,
Counsel for Respondent.

New York, N. Y., October 3, 1942.

(Emphasis throughout ours)